



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 71 OF 2017

SPIRE PROPERTIES (KENYA) LIMITED

T/A DIANI REEF BEACH RESORT & SPA.....PLAINTIFF

-VERSUS-

SANSONNE BANIN T/A THE MAJI BEACH BOUTIQUE HOTEL.....1ST DEFENDANT

THE NATIONAL LAND COMMISSION.....2ND DEFENDANT

MINISTRY OF LANDS, HOUSING AND URBAN

DEVELOPMENT.....3RD DEFENDANT

THE DIRECTOR OF SURVEY, MINISTRY OF

LANDS, HOUSING & URBAN DEVELOPMENT.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. The 1st defendant's application dated 27th November 2017 under the provisions of section 1A & 1B of the Civil Procedure Act and Order 2 rule 15 of the Civil Procedure Rules seeking orders:

1. That the plaint herein be struck out and this suit be dismissed with the costs hereof awarded to the 1st defendant.

2. That the costs of this application be awarded to the 1st defendant.

2. The application is premised on the following grounds:

(a) This suit is an abuse of the process of this Honourable Court;

(b) The plaint herein is scandalous, frivolous and/or vexatious;

(c) The plaintiff is being less than candid in disingenuous in failing to disclose the fact that despite having the opportunity to file its documents in MSA ELC NO. 77 OF 2015 (SANSONNE BANIN trading as THE MAJI BEACH BOUTIQUE HOTEL –VS- THE NATIONAL LAND COMMISSION & 4 OTHERS) as an Interested Party at its own behest, it failed to do so; and

(d) Having failed to comply with the orders of this Honourable Court in the above suit, it is clear that the plaintiff is seeking to circumvent the orders of this Honourable Court by filing this suit.

3. The application is supported further by the facts deposed to in the affidavit of Sansone Banin.

4. Besides the 1st defendants' application, the 2nd defendant also filed a notice of preliminary objection on 24th January 2018 raising the

following grounds:

1. That by dint of section 6 of the Civil Procedure Act the instant suit is subjudice as the issues raised herein for determination are substantially and directly before the Environment and Land Court as between the same parties and over the same suit land in Mombasa ELC Civil Suit No. 77 of 2015 and the same be dismissed summarily with costs.

2. That the instant suit is a gross abuse of the Court process and the same be dismissed summarily with costs.

5. The plaintiff opposed both the application and the notice of preliminary objection by way of a replying affidavit sworn on 4th June 2018 and grounds of opposition dated 5th April 2018. In the replying affidavit, the plaintiff deposed that it applied to be joined in ELC Case No 77 of 2015 as an interested party who could not in law claim, cross-claim or counter-claim against the plaintiffs or the defendants. That the Interested Party in ELC 77 of 2015 could not compel the defendants therein to take a position or object to their amendment of defence admitting the claim except to file another suit. It is the plaintiff's case that this suit is properly before the Court and there will be no conflict of decisions to be made in the two suits.

6. The parties advocates rendered oral submissions which I have taken note of. Taking Ms Litori for the plaintiff's submission that ELC Case No 77 of 2015 is still pending because no judgment was annexed to this application and on the basis of a copy an amended defence in No 77 of 2015 annexed to their replying affidavit, the Court then wonders why the plaintiff would plead that the present suit does not contravene the provisions of section 6 of the Civil Procedure Act. The plaintiff/respondent also argues that they did not file a defence in ELC Case No 77 of 2015 because they were merely interested parties. The plaintiff submitted further that they have appealed this Court's decision rendered on 12.7.2017 dismissing their application dated 16.9.2016 filed in ELC Case No 77 of 2015 which refused them extension of time to file their papers.

7. In analysing the plaintiffs' pleadings and submissions, this Court forms the impression that they want to pursue their claim both in this suit and in ELC Case No 77 of 2015. From the pleadings filed by both parties, it is not denied that this plaintiff moved the Court to be joined as an interested party in case No 77 of 2015. The plaintiff was represented by an advocate. If it held the position of having a claim as against the same parties who it has sued in the present suit, it has not explained why it did not apply to be joined as a defendant in the application for joinder in that suit. Secondly the plaintiff having been joined as a party to that suit, was equally given leave to file his documents. The pleadings should have been filed and left to the Court's discretion to strike them out or not. Failure to file documents inspite of time being extended was the plaintiff's own omission.

8. Order 1 rule 3 of the Civil Procedure Rules provides that "all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts is alleged to exist, whether jointly, severally or in the alternative where if separate suits were brought against such persons any common question of law or fact would arise." The provisions of this rule clearly takes care of the circumstances of this case in relation to ELC No 77 of 2015.

9. It is misconceived for the plaintiff to deny that it is not a party to ELC No 77 of 2015 for the reasons that he was made a party in the earlier suit which joinder order did not limit his participation. This is evidenced by the subsequent application it made on 06.9.2016 for extension of time to file its defence and counter-claim (**annex CAS – 3**) and the subsequent appeal. The abuse of the Court process is worsened when the plaintiff moved the Court (**annex CAS – 4**) for orders of consolidation of this suit and ELC No 77 of 2015 and in its grounds 2 (ii) of the grounds of objection plead thus:

"An Interested Party is not a party to the suit within the meaning of section 6 of the Civil Procedure Act or Order 1 of the Civil Procedure Rules 2010 or party to Mombasa, ELC Civil Suit No. 77/2015 hence incapable of filing a defence, cross claim or counter-claim in law for a relief over the subject matter of the suits particularly interest in 12.19 meters access road between the plaintiff's herein suit property LR. No. 12830/3 and the 1st Defendant herein LR. No. 218 (original No. 16761 and 28169/4) as per judicial precedent in Brek Sulum Hemed vs Constituency Development Fund Board & Anor [2014] eKLR hence the present suit is not sub-judice or at all."

10. In a nutshell the plaintiff having had opportunity to present its case in ELC No 77 of 2015 and which suit he avers is still pending, in my opinion and I so hold that the filing of a fresh suit amounts to abuse of Court process and a party guilty of such abuse should not be allowed to reap from it. This was the holding of the Court of Appeal in the case of **Abud Abdalla Omar & 25 Others vs Kenya Ports Authority & Another Mombasa Civil appeal No 99 of 2017** where the Learned Judges of the Court upheld the decision of Rika J that duplication of the same matter is an abuse of the Court process and must be frowned upon. The second suit in the case cited was struck out. For this reason, I find merit in the notice of motion dated 27th November 2017 and hereby allow it. This suit be and is hereby struck out with costs to the 1st & 2nd defendants.

Dated, signed & delivered at Mombasa this 2nd November 2018

A. OMOLLO

JUDGE